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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 766

IN THE MATTER OF THE
PETITION OF NATIONAL AIRLINES, INC.

NORTHEAST AIRLINES, INC.

v.

CIVIL AERONAUTICS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

MEMORANDUM FOR NORTHEAST AIRLINES, INC., IN OPPOSITION

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February 4, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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By the instant petition, National Airlines, Inc. ("National") joins Eastern Airlines, Inc. ("Eastern") in seeking review of the orders below which limited Eastern and National to participation as *amici curiae* in the review proceedings. National's petition

does not present any points for this Court's consideration of the intervention issue which are not raised in Eastern's petition, No. 720.* Accordingly, Northeast Airlines, Inc. ("Northeast") respectfully refers the Court generally to its brief in opposition to the Eastern petition for the statement of the case and the reasons why the instant petition should be denied. We only wish to point out, in addition, that the three cases on which National places principal reliance convincingly illustrate the lack of merit in National's claim that it should have been allowed to intervene below:

(a) In urging that it will be "bound" by the First Circuit's eventual decision on the merits, National relies on two words—"practical necessities"—from *International Brotherhood of Trainmen* v. *Baltimore & O. R. Co.*, 331 U.S. 519, 524 (1947). Intervention was granted in that case solely under Rule 24(a)(1) of the Federal Rules of Civil Procedure—"when a statute of the United States confers an unconditional right to intervene."** Rule 24(a)(2), to which National attempts to draw an analogy, was not relied upon by the Court in deciding that case.

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* National does not join Eastern in requesting this Court to review the grant of the stay.

Like Eastern, National does not advise this Court of their unsuccessful action in Florida under § 1007 of the Federal Aviation Act in which they tried to enjoin the operations of Northeast to Florida on the theory that the stay granted below was invalid—a position which is, of course, inconsistent with their arguments here that they are "bound" by the proceedings below.

** The statute granting intervention in that case was Section 17(11) of the Interstate Commerce Act, 49 U.S.C. § 17(11). National does not dispute the obvious fact that no section of the Federal Aviation Act grants a right to intervene in review proceedings of CAB orders.

(b) National argues that *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502 (1941), gives it a right under Rule 24(a)(2) to intervene. Even were Rule 24(a)(2) applicable (but see Northeast's Opposition in No. 720, pp. 10-11), *Missouri-Kansas* is inapposite. As this Court there stated, the "foundation" of the intervention rights recognized in that case was laid in the provisions of an antitrust consent decree specifically reserving certain rights to the applicant for intervention and specifically permitting it to become a party—"Rule 24(a) does not touch our problem." *Id.* at 506 and 508.

(c) National relies on *Algonquin Gas Transmission Co.* v. *Federal Power Comm'n*, 201 F.2d 334 (1st Cir. 1953), in attempting to construct a "right" to intervene. But that case *explicitly* stated that intervention, in a similar judicial review proceeding of an administrative order, was a matter for the reviewing court's *discretion*. And National does not attempt to claim—nor could it sensibly do so—that under the factual circumstances the First Circuit abused this discretion in limiting National to participation as *amicus*.

Accordingly, and for the reasons set forth fully in Northeast's Brief in Opposition in No. 720, the petition should be denied.

Respectfully submitted,

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